

**MEDICON PLASTIC INDUSTRIES
SDN. BHD.**

v.

SYARIKAT COSA SDN. BHD.

SUPREME COURT, KUALA LUMPUR
TAN SRI DATUK AMAR HJ. MOHD.
JEMURI BIN SERJAN CJ (BORNEO),
DATO' PEH SWEE CHIN SCJ, DATUK
WIRA WAN YAHYA BIN PAWAN TEH SCJ
[CIVIL APPEAL NO. 01-173-92]
17 JUNE 1993

CONTRACT: Personal liability of agent on a contract made on behalf of principal - Goods from foreign principal, contract of sale and purchase arranged by local agent - Goods not of merchantable quality - Whether purchaser may claim damages from the agent in view of the presumption contained in proviso (a) of s. 183 of the Contracts Act 1950.

The plaintiff/appellant ("plaintiff") claimed damages from the defendant/respondent ("defendant") for breach of a sale and purchase contract in which the goods delivered were alleged to be not fit for the purpose in which they were bought and further were not of merchantable quality. The contract was said to be evidenced in writing. The defendant did not deny having sent the said document but submitted that they were only acting as commissioned agents for the foreign principal, UHAG, based in Zurich.

These were the undisputed facts of the case:

- that the machines were received and paid for by the plaintiff
- payment was made directly to UHAG
- identity of the principal was known to the plaintiff from the outset
- the defendant assembled the machines
- there was no formal written contract between UHAG and the plaintiff.

The High Court found that there was no contract between the plaintiff and the defendant, who had "merely arranged a contract which was entered into between the plaintiff and UHAG."

The plaintiff was dissatisfied with the finding and appealed. The Supreme Court considered that the finding of the learned High Court

a Judge in fact immediately called for deliberation on section 183(a) of the Contracts Act 1950.

Section 183. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

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Such a contract shall be presumed to exist in the following cases:

- (a) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;

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Held:

[1] Proviso (a) to section 183 of the Contracts Act is an exception to the established principle that an agent bears no liability for a contract entered on behalf of a principal. Proviso (a) means unmistakably that personal liability will attach to the agent as a matter of statutory presumption when a person is an agent acting on behalf of a principal in respect of a contract in regard to sale and purchase of goods from a principal who is resident abroad. When the elements are proved, the presumption arises.

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[2] The admission by the defendant in their pleadings that they were agents for UHAG calls for the operation of the proviso. To dismiss the claim of the plaintiff in the light of the admission, the findings of the lower Court and the evidence would be to regard proviso (a) as a dead letter.

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[3] Personal liability under the said proviso attaches in such contracts notwithstanding that the agent is an agent. The only way for the agent to avoid the operation of the proviso would be to contract out of the presumption of such personal liability either by way of express words, or by implication or inference from documents used, other evidence and surrounding circumstances. There was no evidence of such contracting out in the present case.

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[4] Section 183(a) applied to the defendant. The result was that the defendant could be sued personally on the said contract of sale and purchase subject to proof of liability in regard to breach of contract and damages.

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[Appeal allowed with costs. Decision of High Court reversed. Case remitted to same High Court for continuation of hearing and final judgment].

[Bahasa Malaysia Translation of Headnote]

KONTRAK: Liabiliti peribadi ejen ke atas kontrak yang dibuat bagi pihak prinsipal - Barangan dari prinsipal asing, kontrak jual-beli diatur oleh ejen tempatan - Barangan bukan dari kualiti boleh dagang - Sama ada pembeli boleh menuntut ganti rugi daripada ejen melihat kepada anggapan yang terkandung dalam proviso (a) s. 183 Akta Kontrak 1950.

Plaintif/perayu ("plaintif") menuntut ganti rugi daripada defendan/responden ("defendan") bagi kemungkiran kontrak jual-beli di mana barangan yang dihantar serah dikatakan tidak sesuai bagi tujuan untuk maksud ia dibeli dan seterusnya ia tidak berada dalam kualiti boleh dagang. Kontrak tersebut dikatakan tertera dalam bentuk tulisan. Defendan tidak menafikan bahawa ia telah menghantar dokumen tersebut tetapi menghujahkan bahawa mereka hanya bertindak sebagai ejen bertauliah bagi prinsipal asing, UHAG, yang berpusat di Zurich.

Berikut adalah fakta-fakta kes yang tidak dipertikaikan:

- bahawa mesin-mesin tersebut diterima dan dibayar oleh plaintif
- pembayaran dibuat terus kepada UHAG
- identiti prinsipal adalah diketahui oleh plaintif sejak dari mula
- defendan yang memasang mesin-mesin tersebut
- tiada kontrak bertulis yang formal di antara UHAG dan plaintif.

Mahkamah Tinggi mendapati bahawa tiada kontrak di antara plaintif dan defendan, yang hanya "mengatur satu kontrak yang dimasuki di antara plaintif dan UHAG."

Plaintif tidak berpuashati dengan kedatangan tersebut dan membuat rayuan. Mahkamah Agung menimbangkan bahawa kedatangan Hakim Mahkamah Tinggi yang bijaksana tersebut dan dengan serta-merta menimbangkan seksyen 189(a) Akta Kontrak 1950.

Seksyen 183. Jika tiada sebarang kontrak untuk menguatkuasakannya, seseorang ejen itu tidak boleh dengan sendirinya menguatkuasakan kontrak yang dimasuki olehnya bagi pihak prinsipal, dan tidak dengan sendirinya terikat oleh kontrak tersebut.

a Kontrak seperti itu hendaklah dianggap sebagai wujud dalam kes-kes seperti berikut:

- (a) di mana kontrak tersebut dibuat oleh ejen bagi jualan atau belian akan barangan untuk pedagang yang bermastautin di luar negeri.

b **Diputuskan:**

[1] Proviso (a) kepada s. 183 Akta Kontrak ialah suatu pengecualian kepada prinsip yang telah lama bertapak bahawa seseorang ejen tidak menanggung sebarang liabiliti untuk kontrak yang dimasuki bagi pihak prinsipal. Proviso (a) bermakna memang jelas bahawa liabiliti peribadi akan terikat kepada ejen sebagai suatu anggapan statutori apabila seseorang itu ialah ejen yang mewakili prinsipal berhubung dengan jual-beli barangan daripada prinsipal yang bermastautin di luar negeri. Apabila unsur-unsurnya dibuktikan, anggapan pun timbul.

d **[2]** Pengakuan oleh defendan dalam pliding mereka bahawa mereka adalah ejen bagi UHAG membuatkan proviso tersebut perlu diperiksa. Bagi menyingkirkan tuntutan plaintif melihat kepada pengakuan tersebut, kedatangan Mahkamah Rendah dan keterangan berkenaan adalah untuk meyifatkan proviso (a) sebagai surat mati.

f **[3]** Liabiliti peribadi di bawah proviso tersebut terikat dalam kontrak-kontrak seperti itu walau apa pun bahawa ejen tersebut ialah seorang ejen. Satu-satunya ialah untuk ejen tersebut mengelakkan dari pemeriksaan proviso ialah untuk melepaskan daripada kontrak anggapan liabiliti peribadi yang sedemikian sama ada melalui kata-kata yang jelas, atau melalui implikasi atau membuat kesimpulan daripada dokumen-dokumen yang digunakan, lain-lain keterangan dan keadaan-keadaan yang mengelilinginya. Tiada bukti mengenai pelepasan daripada kontrak seperti itu dalam kes semasa ini.

g **[4]** Seksyen 183(a) terpakai kepada defendan. Keputusannya ialah bahawa defendan mungkin disaman secara peribadi atas kontrak jual-beli tersebut tertakluk kepada bukti liabiliti berhubung dengan kemungkinan kontrak dan ganti rugi.

h [Rayuan dibenarkan dengan kos, keputusan Mahkamah Tinggi diterbalikkan. Kes dihantar ke Mahkamah Tinggi yang sama untuk menyambung pendengaran dan penghakiman muktamad].

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Cases referred to:

Amstrong v. Stokes [1872] 7 QB at 506 (**refd**)
Gnanasundera v. Berton Export Co. of New York
 AIR [1964] 13 (V. 51 C. 33) (**folld**)

Legislation referred to:

Contracts Act 1950, s. 183(a)
 Rules of the High Court 1980, O. 11 r. 1(f)(ii)
 Indian Contracts Act 1872, s. 230

For the appellant - A. Kanesalingam; M/s. Kanesalingam & Co.

For the respondent - Chin Yew Meng; M/s. Allen & Gledhill

JUDGMENT**Peh Swee Chin SCJ:**

The appeal raises the question of the limits or scope of the statutory presumption under s. 183(a) of our Contracts Act 1950 (hereinafter the Act) which for convenience is set out below:

Section 183. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by them.

Such a contract shall be presumed to exist in the following cases:

- (a) where the contract is made by an agent for the sale or purchase of good for a merchant resident abroad;
- (b)
- (c)

Both parties are locally-incorporated companies. The plaintiff has allegedly purchased certain machines from the defendant for the purpose of making plastic bottles. When the machines arrived from abroad, viz. Switzerland, the plaintiff complained that they were not fit for the purpose for which they were bought and were further defective or were not of merchantable quality. The plaintiff sued the defendant.

By its statement of claim as amended, the plaintiff has contended that it bought the machines from the defendant by "a contract evidenced in writing dated 8 July 1977 ..." and to cut the matter short, plaintiff has claimed damages, etc. By its defence, as amended, the defendant, while admitting to having sent the said letter, has contended that there was no contract between the plaintiff and the defendant and "that the existence of a contract, if any, is between the plaintiff and the defendant's principal, namely UHAG Kebersee-Handel Ag. Zurich", (hereinafter UHAG).

- a It has never been disputed that the machines in question were received and paid for by the plaintiff and in the purchase of which, the defendant alleged it merely acted as commission agent for UHAG. Neither has it been disputed that the payment was made directly to UHAG and the defendant "commissioned" or assembled the machines for the plaintiff who negotiated with the defendant about technical details of the machines. The cut and thrust of the defendant's evidence and submission has been about the defendant being merely an agent for UHAG and about the plaintiff having made a sale and purchase contract with UHAG and not with the defendant, amounting to there being no contract as such between the defendant and the plaintiff.
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From the grounds of judgment, his Lordship appears to have held that there was "no contract in law" between the plaintiff and the defendant, and at page 18 of the Appeal Record, said:- "This is to my mind not a case when the defendant had entered into a contract with the plaintiff on behalf of their principal but rather of a case when the defendant merely arranged a contract which was entered into between the plaintiff and UHAG. Defendant was therefore an agent and there was no contract between the defendant and the plaintiff".

- d After analyzing a great deal of documentary and oral evidence, the lower Court came to the finding that defendant was the agent of UHAG.
- e This would merely reinforce the plea in the defence (as amended) that the defendant was an agent for UHAG, but his Lordship dismissed the claim for damages of the plaintiff without considering further all other issues raised before him.
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- g It has further never been disputed that UHAG's name and identity have been known to the plaintiff from the outset and this the defendant has been at pains to stress. That UHAG has been the seller of goods and resident abroad (Switzerland) has never been in doubt. There was also no formal written contract between UHAG and the plaintiff. The findings and facts of this case in our opinion, then fit squarely into the statutory presumption under s. 183(a) of the Act which would apply to the instant case.
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- i Section 183 states the well-known ordinary rule of no personal liability for an agent, but this rule is subject to quite a few exceptions

one of which is s. 183(a). If one reads and re-reads this proviso (a), it will still mean unmistakably that personal liability will attach to the agent as a matter of statutory presumption when a person is an agent acting on behalf of a principal in respect of a contract in regard to sale and purchase of goods from the principal who is resident abroad. This presumption of personal liability arises when the above elements are proved.

It, is to be borne in mind that the proviso must have been derived from the state of the common law at the time when the Indian Contracts Act 1872 was enacted in or about 1872. At, common law, the origin of the point, in question appears to be an English mercantile usage to the effect, that in a sale or purchase of goods credit is considered to be given by local businessmen to a local agent of a merchant resident abroad and not to the latter because, *inter alia*, it is said the merchant abroad in such a sale or purchase of goods does not give the local agent any authority to pledge his credit to those with whom the local agent deals, see *Amstrong v. Stokes* [1872] 7 QB at 506; for it is easily understandable that a local businessman will not normally give credit to the foreign principal of the local agent, but only to the latter for, generally, for example, the credit-worthiness or quality of goods of the merchant resident abroad is often fraught with uncertainties and such similar uncertainties must have been more daunting in olden days.

In general, a foreign principal who makes a contract through a local agent can sue and be sued in our local Courts, (for example, O. 11 r. 1(f)(ii) of the Rules of High Court 1980, in fact provides expressly for the procedure for such a foreign principal to be served out of jurisdiction), though such proceedings involving such a foreign principal could give rise to some concomitant inconveniences such as being liable to be required to provide for security for costs when suing and being required to apply for leave for service out of jurisdiction etc. when sued. Such a local agent, exceptionally, can be sued personally in certain well-known but limited cases and one of which is this proviso (a). For example, such a local agent was sued together with his foreign principal in a same action in *Gnansundera v. Berton Export Co. of New York* AIR [1964] 13 (V. 51 C. 33).

a It is to be borne in mind that the proviso was enacted in the Indian Contract Act 1872, and it was based on the state of common law touching on the same point as in 1872. It is entirely possible that the common law giving rise to the proviso has, since 1872, been modified or further developed by cases in England and English cases on the same point decided prior to 1872 would be arguably more relevant.

b With the proviso, the local people would be better protected in their dealings with the foreign merchants for they can pin their hope on the local agents for their price or goods. This mercantile usage (which has been criticized by some writers) is of universal value, not being valuable only to the native English.

c Dealing now more directly with the scope of the proviso (a), the findings of the learned Judge and the admission by pleading would certainly attract the operation of the proviso (a). To dismiss the claim of the plaintiff herein in the light of such evidence, finding and admission by pleading, would be obviously to regard the proviso (a) as a dead letter, in our opinion, with respect to the learned trial Judge. We must hasten to add that the commentary under this proviso (a) in some well-known text book could have very well given rise to some confusion caused in turn by some confusion in the decided cases up to the date of the edition of that book.

d It does not seem to be sufficiently realized that the statutory presumption from this proviso (a) is a presumption that **personal liability** of an all-apparent agent in respect of such a contract as the one involved herein shall he presumed to exist notwithstanding that the agent is an agent, (the emphasis is mine). It is certainly not a presumption to the effect that a contract of a foreign principal should be presumed to be the personal contract of his local agent, unless the local agent proves that it is not his contract but his principal's contract.

e For merely to prove that it was in fact the contract of the foreign principal and the agent has merely acted as agent is definitely not enough for the purpose of this proviso (a) for such proof would just merely trigger the operation of the statutory presumption.

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The only way for an agent of a foreign principal, in our opinion, to get rid of the personal liability of such an agent would be, either by express words or impliedly by a necessary inference or implication from documents, evidence and surrounding circumstances showing that the agent has in fact, contracted out of such statutory presumption or such personal liability. We have found no such evidence in the instant case.

Thus the case of *Gnanasundera, supra*, is a classic case in point. In that case, (apparently on the level of a Court of Appeal from an assistant Judge of Madras Civil Court), the Madras plaintiff there purchased goods from the 1st defendant, a firm in New York, U.S.A. through the 2nd defendants, agents in Madras for the said American firm. The plaintiff, having paid for the goods by letter of credit, found the goods when they arrived, to be not up to description, and sued both the American firm as first defendant and the Madras agents as second defendants. The contract signed, by its clause 26 significantly provided an exemption of liability granted by the plaintiff, there in favour of the Madras agents as follows:

If the goods are delivered for any reason mentioned in para 22 or the goods happen to be other than the one ordered for or inferior in quality, for all the above deviations singly or all put together I/we will not hold you responsible to pay me/us any damages or compensation but I/we will have all our action against your principals and none against you as the agents of your principals.

It was argued for the the Madras agents that they were merely brokers for the American firm, and that the contract was directly between the plaintiff and the American firm so that the section in Indian Contracts Act, 1872, [*in pari materia* with s. 183(a) of our Act] had no application. This argument was rejected unanimously. It was apparently further argued that the Madras agents ought to be exonerated by clause 26 quoted above. It was held to the effect that clause 26 there did exempt the Madras agents from liability to the plaintiff in regard to damages for inferior goods, or goods other than those ordered but the Court there found there was no clause in that contract to exempt the Madras agents from the liability to refund the money paid already, to the American firm, against which goods as ordered had not been delivered and the Madras agents (the 2nd defendants) were therefore ordered to refund such money.

a Jagadison, J. in delivering a concurring but separate judgment said at p. 114:

What then is the correct position on the facts of this case? We do not have the slightest doubt that the second defendant acted as the agent of the first defendant. The terms of the contract and the surrounding circumstances establish this quite clearly. The name of the principal is also disclosed. The second defendant cannot, therefore, be made personally liable under the contract. But being an agent of a foreign principal who sold the goods to the plaintiff he falls squarely within the exception under s. 230. In order to avoid personal liability, the second defendant must show that by express words or by necessary implication he contracted out of such liability. In regard to the liability of damages cl. 26 referred to by my learned brother in his judgment quite clearly exempts him from liability of any kind. But in regard to the refund of the advance amount, there is no specific provision in the contract excluding the liability.

We entirely agree with the reasoning in that case.

e We feel we ought to allow the appeal by holding that s. 183(a) applies to the defendant and that the defendant is bound by or can be sued personally on the contract of sale and purchase of the said machines which has existed, subject of course to proof of liability in regard to breach of contract and damages. It remains for his Lordship in the Court below **f** to continue to deal with and determine by a subsequent or final judgment all other issues raised, (including the issues of liability for defective goods etc. and of damages, if any, and the amount of such damages etc.), the determination of which was deemed earlier to have been unnecessary because of the decision which is being hereby reversed. We do not propose to order a retrial before another Judge because of the excessive delay, inconvenience and expenses that will be caused.

g We therefore allow the appeal with costs here and below. We further remit Kuala Lumpur High Court Civil Suit No. 241-1979 to the lower Court for continuation by the same Judge and subsequent decision on the whole case, with further costs incurred hereafter to abide by any further order of the lower Court. Deposit in this Court is to be paid out to the appellants on account of taxed costs.

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